

1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

2

KAMLESH BANGA,
Plaintiff,

3

v.

4

EQUIFAX INFORMATION SERVICES
LLC,

5

Defendant.

6

Case No. 14-cv-03038-WHO

7

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. No. 86

8

INTRODUCTION

9

Plaintiff Kamlesh Banga, proceeding pro se, brings this action against defendant Equifax Information Services LLC (“Equifax”) because in a prior lawsuit she brought against Equifax in this district, *Banga v. Equifax Info. Servs. LLC*, No. 09-cv-04807-JSW (N.D. Cal. filed Oct. 8, 2009), Equifax filed excerpts from two of her credit reports with the district court and Ninth Circuit without first redacting from the reports her Social Security number and other personal identifying information. She claims that in doing so, Equifax breached the Stipulated Protective Order in that case, and also violated California Civil Code § 1798.85(a)(1), California’s Unfair Competition Law (“UCL”), and her right to privacy under the California Constitution. Separately, she accuses Equifax of violating the Fair Credit Reporting Act (“FCRA”) by failing to exclude her name from promotional lists distributed to third-party credit providers despite her repeated requests that her name be excluded from such lists.

10

Equifax moves for summary judgment on each of Banga’s five causes of action. Banga’s claims that arise from the disclosure of her personal identifying information in the prior lawsuit are barred by California’s litigation privilege, unsupported by the evidence, or both. Accordingly, Equifax’s motion for summary judgment on Banga’s first, second, fourth, and fifth causes of action – each of which is based exclusively on that allegedly illegal disclosure – is GRANTED. But genuine disputes of material fact remain whether Banga made a telephone call on October 15, 2010 that complied with FCRA requirements to have Equifax exclude her name from promotional lists distributed to third-party credit providers, and whether she suffered damages as a result of

1 Equifax's breach of that obligation. Equifax's motion for summary judgment on Banga's third
2 cause of action for negligent violation of the FCRA is DENIED, as discussed below.

3 BACKGROUND

4 I. BANGA'S PRIOR LAWSUITS AGAINST EQUIFAX

5 This is the third in a series of lawsuits that Banga has brought against Equifax in this
6 district.¹ She filed the first one on June 18, 2008. *Banga v. National Credit Union*
7 *Administration*, No. 08-cv-03015-MMC (N.D. Cal. filed Jun. 18, 2008) ("Banga I"). On October
8 6, 2009, Judge Chesney granted Equifax's motion for summary judgment. *Id.* at Dkt. No. 167.
9 Shortly thereafter, Banga and the remaining defendant entered a settlement agreement and Judge
10 Chesney dismissed the case. *Id.* at Dkt. Nos. 172, 179.

11 Banga filed the second lawsuit on October 8, 2009. *Banga v. Equifax Info. Servs. LLC*,
12 No. 09-cv-04807-JSW (N.D. Cal. filed Oct. 8, 2009) ("Banga II"). Banga claimed, among other
13 things, that Equifax had violated a provision of the FCRA, 15 U.S.C. § 1681b(e), and an
14 analogous provision of the California Consumer Credit Reporting Agencies Act ("CCRAA"), Cal.
15 Civ.Code § 1785.11(d)(1). Both statutes concern the circumstances under which a credit reporting
16 agency may disclose information about a consumer to a third party for the purposes of a credit
17 transaction "not initiated by the consumer," i.e., for promotional purposes. *See* 15 U.S.C. §
18 1681b(e); Cal. Civ. Code § 1785.11(d)(1). Banga alleged that on April 14, 2003, she "had a
19 promotional block placed on her [credit] report so that junk mail solicitations for credit would be
20 unable to utilize the information on her credit report," and that on July 10, 2003, she "sent a
21 written request that her credit report should be excluded permanently [from] all preapproved credit
22 offer . . . mailing lists." *Banga II*, Dkt. No. 69 ¶ 9. She alleged that Equifax "had sold her credit
23 report for promotional purposes to . . . numerous entities after [she] had placed a promotional
24 block on her credit report." *Id.* ¶ 10.

25 On January 25, 2011, Judge White granted Equifax's motion for summary judgment,
26 holding that Banga's claims were barred by the applicable statutes of limitations for the FCRA and

27
28 ¹ Banga has also filed a number of other lawsuits in this district against other credit reporting
agencies and/or credit providers.

1 CCRAA, and that she had failed to produce sufficient evidence of either damages or willfulness,
2 as required to support her claims under both statutes. *Banga II*, Dkt. No. 108. In ruling on
3 willfulness, Judge White found that Banga “failed to proffer any evidence whatsoever of
4 [Equifax’s] practices and failed to dispute the fact that [Equifax] never received [the written
5 request she allegedly sent on July 10, 2003].” *Id.* at 5. Thus, Banga had “failed to provide any
6 basis for her conclusory assertions that [Equifax] acted willfully or in reckless disregard of the
7 law.” *Id.* Judge White also found that Banga’s claims were time-barred. *Id.* at 4. The Ninth
8 Circuit affirmed on appeal, finding that the claims were time-barred but not addressing the
9 damages/willfulness issue. *Banga II*, Dkt. No. 122.

10 **II. BANGA’S CURRENT CLAIMS AGAINST EQUIFAX**

11 Banga filed this action on December 30, 2013 in the Superior Court of California for the
12 County of San Francisco. Dkt. No. 1-2. She served Equifax with her first amended complaint on
13 June 18, 2014. Dkt. No. 1-1 (“FAC”). On July 2, 2014, Equifax removed the case to federal
14 court. Dkt. No. 1.

15 **A. First Amended Complaint**

16 Banga’s claims in her FAC were based on two distinct courses of conduct by Equifax.
17 *See, e.g.*, FAC ¶ 6. First, she alleged that Equifax “displayed [her] Social Security number, date of
18 birth, [and] current and past addresses to the general public by filing [her] partial credit reports of
19 August 14, 2007 and July 20, 2004 with the Ninth Circuit and district court’s dockets without
20 seal.” *Id.* Equifax initially displayed the credit reports on October 26, 2010 by filing them as an
21 exhibit attached to the Declaration of Vicki Banks (the “Banks Declaration”) submitted in support
22 of its motion for summary judgment before Judge White in *Banga II*. *Id.* ¶ 12. Equifax then
23 displayed the credit reports a second time by including the Banks Declaration in the excerpts of
24 record it filed with the Ninth Circuit on appeal. *Id.* ¶ 11.

25 Banga stated that she first noticed that the credit reports had been filed “without seal” on
26 October 30, 2012, more than two years after Equifax first submitted them in *Banga II*. *Id.* The
27 next day, Banga wrote a letter to Equifax requesting that the credit reports be immediately
28 removed from the district court and Ninth Circuit dockets. *Id.* ¶ 12. Equifax did not respond. *Id.*

1 On December 3, 2012, Banga again requested that the credit reports be removed, but again without
2 success. *Id.* ¶ 13.

3 On July 2, 2014, shortly after being served with Banga’s FAC, Equifax filed motions with
4 the district court and Ninth Circuit seeking to strike the offending credit reports from the courts’
5 records and to replace them with properly redacted versions. *See Banga II*, Dkt. No. 126; *Banga*
6 *v. Equifax Info. Servs. LLC*, No. 11-15460, Dkt. No. 35 (9th Cir. July 2, 2014) (“*Banga Appeal*”).
7 Both motions were granted, and the credit reports have since been struck from the courts’ records.
8 *Banga II*, Dkt. Nos. 75, 127; *Banga Appeal*, Dkt. Nos. 16, 36. Equifax refiled the Banks
9 Declaration with a properly redacted exhibit on August 8, 2014. *Banga II*, Dkt. No. 129. The
10 exhibit in question is twelve pages long; Banga’s now-redacted personal identifying information
11 appears on pages six and twelve. *See id.*

12 The second basis for Banga’s claims in the FAC was her allegation that Equifax
13 “impermissibly disseminated [her] credit report information for promotional purposes to third
14 parties notwithstanding the fact that [her] name had been blocked permanently from all
15 preapproved credit offer mailing lists.” FAC ¶ 6. I discuss this theory of liability and the relevant
16 facts in detail in Section III of this Order below.

17 The FAC alleged five causes of action against Equifax: (1) “breach of election to opt-out”
18 in violation of California Civil Code § 1785.11(d)(1) (but not in violation of the FCRA);
19 (2) violation of California Civil Code § 1798.85(a)(1);² (3) common law invasion of privacy;
20 (4) violation of the UCL, Cal. Bus. & Prof. Code § 17200 *et seq.*; and (5) violation of the right to
21 privacy protected by Article I, Section 1 of the California Constitution. FAC ¶¶ 19-44.

22 B. Prior Order

23 On June 18, 2015, I issued an order granting Equifax’s motion for judgment on the
24 pleadings. Dkt. No. 49 (“Prior Order”). I began by holding that to the extent that Banga’s claims
25 were based on the disclosure of her Social Security number and other personal identifying

27 ² California Civil Code § 1798.85(a)(1) makes it illegal to “[p]ublicly post or publicly display in
28 any manner an individual’s social security number.” Cal. Civ. Code § 1798.85(a)(1). The statute
defines “publicly post” and “publicly display” as “to intentionally communicate or otherwise make
available to the general public.” *Id.*

1 information during the course of *Banga II* and the *Banga Appeal*, they were barred by California's
2 litigation privilege. Prior Order at 6-9. This completely disposed of Banga's cause of action
3 under California Civil Code § 1798.85(a)(1), which was based exclusively on the filing of her
4 unredacted credit reports. *Id.* at 9.

5 I then found that the rest of Banga's claims also failed to the extent that they were based on
6 her second theory of liability, i.e., that Equifax "impermissibly disseminated [her] credit report
7 information for promotional purposes to third parties notwithstanding the fact that [her] name had
8 been blocked permanently from all preapproved credit offer mailing lists." FAC ¶ 6. Her cause of
9 action under California Civil Code § 1785.11(d)(1) was defective because that provision is
10 preempted by the FCRA. Prior Order at 9-12. Her common law invasion of privacy claims failed
11 because she had not plausibly alleged either that any "offensive and objectionable private facts"
12 had been disclosed, or that she had suffered an actionable "intrusion into a private place,
13 conversation, or matter." *Id.* at 12-14 (internal quotation marks omitted). Her state constitutional
14 right to privacy claims failed for essentially the same reasons, and her UCL claims were aimed
15 principally at the allegedly illegal disclosure of her personal identifying information and were
16 either barred by the litigation privilege or implausibly alleged. *Id.* at 15-16.

17 In light of Banga's pro se status, I gave her leave to amend and specifically allowed her to
18 add claims for breach of contract and for violation of the FCRA. *Id.* at 16.

19 **C. Second Amended Complaint**

20 Banga's Second Amended Complaint ("SAC") is based on the same two alleged courses of
21 conduct as the FAC, i.e., (1) the disclosure of her Social Security number and other personal
22 identifying information during the course of *Banga II* and the *Banga Appeal*, and (2) the allegedly
23 improper distribution of her credit information for promotional purposes. *See, e.g.*, SAC ¶ 6 (Dkt.
24 No. 50).

25 The factual allegations in the SAC are substantially similar to those in the FAC, although
26 the causes of action are slightly different. Banga now alleges causes of action for (1) breach of
27 contract, based on Equifax's alleged breach the terms of the Stipulated Protective Order entered in
28 *Banga II* by failing to redact her Social Security number and other personal identifying

1 information from the credit reports; (2) violation of California Civil Code § 1798.85(a)(1), also
2 based on the disclosure of her personal identifying information in *Banga II* and the *Banga Appeal*;
3 (3) violation of the FCRA, 15 U.S.C. § 1681b(e) and 15 U.S.C. § 1681e, based on the allegedly
4 improper distribution of her credit information for promotional purposes; (4) violation of the UCL,
5 based on the disclosure of her personal identifying information in *Banga II* and the *Banga Appeal*;
6 and (5) violation of the right to privacy protected by Article I, Section 1 of the California
7 Constitution, also based on the disclosure of her personal identifying information in *Banga II* and
8 the *Banga Appeal*. See SAC ¶¶ 22-51.

9 Equifax filed this motion for summary judgment on January 20, 2016. Dkt. No. 86
10 (“Mot.”). I heard argument from the parties on February 24, 2016. Dkt. No. 100.

11 **LEGAL STANDARD**

12 A party is entitled to summary judgment where it “shows that there is no genuine dispute
13 as to any material fact and [it] is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A
14 dispute is genuine if it could reasonably be resolved in favor of the nonmoving party. *Anderson v.*
15 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material where it could affect the
16 outcome of the case. *Id.*

17 The moving party has the initial burden of informing the court of the basis for its motion
18 and identifying those portions of the record that demonstrate the absence of a genuine dispute of
19 material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Once the movant has
20 made this showing, the burden shifts to the nonmoving party to identify specific evidence showing
21 that a material factual issue remains for trial. *Id.* The nonmoving party may not rest on mere
22 allegations or denials from its pleadings, but must “cit[e] to particular parts of materials in the
23 record” demonstrating the presence of a material factual dispute. Fed. R. Civ. P. 56(c)(1)(A). The
24 nonmoving party need not show that the issue will be conclusively resolved in its favor. See
25 *Anderson*, 477 U.S. at 248-49. All that is required is the identification of sufficient evidence to
26 create a genuine dispute of material fact, thereby “requir[ing] a jury or judge to resolve the parties’
27 differing versions of the truth at trial.” *Id.* (internal quotation marks omitted). If the nonmoving
28 party cannot produce such evidence, the movant “is entitled to . . . judgment as a matter of law

1 because the nonmoving party has failed to make a sufficient showing on an essential element of
2 her case.” *Celotex*, 477 U.S. at 323.

3 On summary judgment, the court draws all reasonable factual inferences in favor of the
4 nonmoving party. *Anderson*, 477 U.S. at 255. “Credibility determinations, the weighing of the
5 evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a
6 judge.” *Id.* However, conclusory and speculative testimony does not raise a genuine dispute and
7 is insufficient to defeat summary judgment. *See Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594
8 F.2d 730, 738-39 (9th Cir. 1979).

9 DISCUSSION

10 **I. BANGA’S SECOND, FOURTH, AND FIFTH CAUSES OF ACTION ARE BARRED BY CALIFORNIA’S LITIGATION PRIVILEGE**

11 As alleged in the SAC, Banga’s second, fourth, and fifth causes of action – for violation of
12 California Civil Code § 1798.85(a)(1), the UCL, and her right to privacy under Article I, Section 1
13 of the California Constitution – are each based exclusively on the disclosure of her Social Security
14 number and other personal identifying information in *Banga II* and the *Banga Appeal*. As I
15 explained in the Prior Order, to the extent that these causes of action are based on that disclosure,
16 they are barred by California’s litigation privilege. Prior Order at 6-9. Banga offers no persuasive
17 reason to depart from this reasoning, and it continues to apply here. Because the second, fourth,
18 and fifth causes of action are each based exclusively on a theory of liability that is barred by
19 California’s litigation privilege, Equifax is entitled to judgment as a matter of law as to them. Its
20 motion for summary judgment as to these causes of action is GRANTED.

21 **II. EQUIFAX’S ALLEGED BREACH OF THE STIPULATED PROTECTIVE ORDER IN BANGA II DOES NOT SUPPORT A CLAIM FOR BREACH OF CONTRACT**

22 Equifax is also entitled to judgment as a matter of law on Banga’s first cause of action for
23 breach of contract. The elements of a claim for breach of contract under California law are:
24 (1) existence of a contract; (2) plaintiff’s performance or excuse for nonperformance;
25 (3) defendant’s breach; and (4) damages to plaintiff as a result of the breach. *Abdelhamid v. Fire*
26 *Ins. Exch.*, 182 Cal. App. 4th 990, 999 (2010); *CDF Firefighters v. Maldonado*, 158 Cal. App. 4th
27 1226, 1239 (2008).

1 Banga's breach of contract claim is based on the theory that Equifax breached the terms of
2 the Stipulated Protective Order in *Banga II* by failing to properly redact her credit reports. *See*
3 SAC ¶¶ 22-26. She highlights sections 3 and 10 of the Stipulated Protective Order, which provide
4 as follows:

5 3. [SCOPE:] The protections conferred by this Stipulation and Order
6 cover not only Protected Material (as defined above), but also any
7 information copied or extracted therefrom, as well as all copies,
8 excerpts, summaries, or compilations thereof, plus testimony,
9 conversations, or presentations by parties or counsel to or in court or
10 in other settings that might reveal Protected Material.

11 10. [FILING PROTECTED MATERIAL:] Without written
12 permission from the Designating Party or a court order secured after
13 appropriate notice to all interested persons, a Party may not file in
14 the public record in this action any Protected Material. A Party that
15 seeks to file under seal any Protected Material must comply with
16 Civil Local Rule 79-5.

17 Stipulated Protective Order §§ 3, 10 (SAC Ex. A).

18 The Stipulated Protective Order defines "Protected Material" as "any Disclosure or
19 Discovery Material that is designated as 'Confidential' or as 'Highly Confidential – Attorneys'
20 'Eyes Only.'" *Id.* § 2.8. It defines "Disclosure or Discovery Material" as "all items or information,
21 regardless of the medium or manner generated, stored, or maintained (including, among other
22 things, testimony, transcripts, or tangible things) that are produced or generated in disclosures or
23 responses to discovery in this matter." *Id.* § 2.2.

24 Banga's breach of contract claim fails because there is no evidence that Equifax breached
25 the terms of the Stipulated Protective Order. "[T]o determine whether or not a protective order
26 has been violated, courts focus on the terms of the order itself." *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 2014 U.S. Dist. LEXIS 11778, 33 (N.D. Cal. Jan. 29, 2014); *see also Biovail Labs., Inc. v. Anchen Pharm., Inc.*, 463 F. Supp. 2d 1073, 1080-81 (C.D. Cal. 2006). "A protective order
should be read in a reasonable and common sense manner so that its prohibitions are connected to
its purpose." *On Command Video Corp. v. LodgeNet Entm't Corp.*, 976 F. Supp. 917, 921 (N.D. Cal. 1997).

27 The very sections of the Stipulated Protective Order highlighted by Banga make clear that
28 it was not breached by the filing of her unredacted credit reports. The Stipulated Protective Order

1 plainly applies only to “Protected Material” and associated information. *Id.* § 3. There is no
2 indication that the unredacted credit reports filed by Equifax either qualified as Protected Material
3 within the meaning of the Stipulated Protected Order, or contained or revealed information
4 extracted from such material. Banga does not dispute that she did not produce the credit reports
5 and that they were not designated by either party as “Confidential” or “Highly Confidential.” Nor
6 does she dispute that the credit reports did not reflect any information that had been designated as
7 either “Confidential” or “Highly Confidential” by either party. This is fatal to her breach of
8 contract claim. Banga has not shown that Equifax’s failure to redact her Social Security Number
9 and other personal identifying information from the credit reports constituted a breach of the
10 Stipulated Protective Order, and she identifies no other basis for the claim.³ *See* SAC ¶¶ 22-26.

11 In addition, Banga’s breach of contract theory is barred by California’s litigation privilege.
12 While the privilege “generally protects from tort liability any publication made in connection with
13 a judicial proceeding,” *Jacob B. v. Cnty. of Shasta*, 40 Cal.4th 948, 952 (2007), “whether [it]
14 applies to an action for breach of contract turns on whether its application furthers [its] underlying
15 [policies],” *Wentland v. Wass*, 126 Cal. App. 4th 1484, 1492 (2005). This case-specific approach
16 allows certain breach of contract claims to evade being barred by the privilege, despite involving
17 conduct occurring during the course of litigation. *See, e.g., id.* at 1494 (litigation privilege did not
18 bar breach of contract claim “based on [the] breach of a separate promise independent of the
19 litigation”); *Yardley v. ADP TotalSource, Inc.*, No. 13-cv-04639, 2014 WL 1496333, at *2 (C.D.
20 Cal. Apr. 4, 2014) (litigation privilege did not render futile proposed counterclaim for breach of
21 nondisclosure agreement); *USA Wheel & Tire Outlet # 2, Inc. v. United Parcel Serv. Inc.*, No. 13-
22 cv-00403, 2014 WL 197733, at *3-4 (C.D. Cal. Jan. 14, 2014) (litigation privilege did not bar
23 claim for breach of confidentiality agreement); *T.T. ex rel. Susan T. v. Cnty. of Marin*, No. 12-cv-
24 02349-WHA, 2013 WL 308908, at *5-6 (N.D. Cal. Jan. 25, 2013) (“[a]fter weighing the public
25 policy interests,” concluding that the privilege did not apply because the breach of contract claim
26 was based on “a separate promise independent of the litigation,” and because “otherwise any effort
27

28 ³ This is not to say that it was acceptable for Equifax to publicly file Banga’s complete Social Security number in the record. It clearly was not. *See, e.g., Fed. R. Civ. P. 5.2(a).*

1 to enforce an otherwise valid litigation release could be hamstrung by invocation of the litigation
2 privilege”).

3 But Banga’s breach of contract theory is clearly at odds with the policies underlying the
4 privilege, i.e., “to afford litigants and witnesses free access to the courts without fear of being
5 harassed subsequently by derivative tort actions, to encourage open channels of communication
6 and zealous advocacy, to promote complete and truthful testimony, to give finality to judgments,
7 and to avoid unending litigation.” *Rusheen v. Cohen*, 37 Cal.4th 1048, 1063 (2006). Allowing her
8 to proceed on a breach of contract claim based on the alleged violation of the Stipulated Protective
9 Order would contravene each and every one of these policies. As I explained in the Prior Order,
10 Banga had at her disposal multiple remedies for the filing of her unredacted credit reports in
11 *Banga II* and the *Banga Appeal*. See Prior Order at 8. Suing for breach of contract was not one of
12 them. *Cf. Pollock v. Superior Court*, 229 Cal. App. 3d 26, 29 (1991) (holding that the litigation
13 privilege prohibited a lawyer from bringing a breach of contract claim against his opposing
14 counsel for failing to follow through on a promise to take an upcoming mandatory settlement
15 conference off calendar; stating that “the public policy of this state is not served by permitting
16 attorneys to sue one another for omissions or representations made as officers of the court during
17 the course of litigation”).

18 Equifax’s motion for summary judgment on Banga’s first cause of action for breach of
19 contract is GRANTED.

20 **III. BANGA’S THIRD CAUSE OF ACTION FOR VIOLATION OF THE FCRA**

21 Banga accuses Equifax of willfully violating the FCRA, 15 U.S.C. § 1681b(e), by
22 disseminating her credit information to third-party credit providers for promotional purposes “after
23 she had elected to exclude her name from all preapproved credit offer[] mailing lists by credit
24 grantors.” SAC ¶ 36. She further alleges that this same conduct constituted a willful violation of
25 15 U.S.C. § 1681e in that “Equifax did not make any effort to verify its own record that [she] had
26 elected to exclude her name from all preapproved credit offers mailing lists.” *Id.*

27 **A. Statutory Framework**

28 Banga’s FCRA claims rest on the complicated statutory framework governing the

1 distribution of credit information for promotional purposes. Under 15 U.S.C. § 1681b(e)(1),

2 [a] consumer may elect to have the consumer's name and address
3 excluded from any list provided by a consumer reporting agency
4 under [15 U.S.C. § 1681b(c)(1)(B)] in connection with a credit or
5 insurance transaction that is not initiated by the consumer, by
6 notifying the agency in accordance with [15 U.S.C. § 1681b(e)(2)]
7 that the consumer does not consent to any use of a consumer report
8 relating to the consumer in connection with any credit or insurance
9 transaction that is not initiated by the consumer.

10 15 U.S.C. § 1681b(e)(1).

11 15 U.S.C. § 1681b(c)(1)(B) explains that a credit reporting agency may disclose
12 information about a consumer for the purposes of a transaction "not initiated by the consumer"
13 where, among other prerequisites, "the transaction consists of a firm offer of credit," and "there is
14 not in effect an election by the consumer, made in accordance with [15 U.S.C. § 1681b(e)], to
15 have the consumer's name and address excluded from lists of names provided by the agency." 15
16 U.S.C. § 1681b(c)(1)(B). Only limited categories of information may be disclosed pursuant to 15
17 U.S.C. § 1681b(c)(1)(B): "(A) the name and address of a consumer; (B) an identifier that is not
18 unique to the consumer and that is used by the person solely for the purpose of verifying the
19 identity of the consumer; and (C) other information pertaining to a consumer that does not identify
20 the relationship or experience of the consumer with respect to a particular creditor or other entity."
21 15 U.S.C. § 1681b(c)(2).

22 15 U.S.C. § 1681b(e)(2) describes the two ways in which a consumer may notify a credit
23 reporting agency of her decision to opt-out of the promotional distribution of her credit
24 information: "through the notification system maintained by the agency;" or "by submitting to the
25 agency a signed notice of election form issued by the agency." 15 U.S.C. § 1681b(e)(2). If a
26 consumer uses the "notification system" to opt-out, the credit reporting agency must cease
27 promotional distribution of the consumer's credit information for a period of five years. 15 U.S.C.
28 § 1681b(e)(4)(B)(i). If the consumer submits to the agency a "signed notice of election form
issued by the agency," the credit reporting agency must cease promotional distribution of the
consumer's credit information permanently, or until the consumer requests that the promotional
block be removed. 15 U.S.C. § 1681b(e)(4)(B)(ii).

1 Under 15 U.S.C. § 1681e(a), also cited by Banga,

2 Every consumer reporting agency shall maintain reasonable
3 procedures designed to avoid violations of section 1681c of this title
4 and to limit the furnishing of consumer reports to the purposes listed
5 under section 1681b of this title. These procedures shall require that
6 prospective users of the information identify themselves, certify the
7 purposes for which the information is sought, and certify that the
8 information will be used for no other purpose. Every consumer
9 reporting agency shall make a reasonable effort to verify the identity
10 of a new prospective user and the uses certified by such prospective
11 user prior to furnishing such user a consumer report. No consumer
12 reporting agency may furnish a consumer report to any person if it
13 has reasonable grounds for believing that the consumer report will
14 not be used for a purpose listed in section 1681b of this title.

15 U.S.C. § 1681e(a).

1 A defendant who “willfully fails to comply with any requirement imposed under [the
2 FCRA] with respect to any consumer is liable to that consumer” for “any actual damages sustained
3 by the consumer as a result of the failure,” or for statutory damages “of not less than \$100 and not
4 more than \$1,000.” 15 U.S.C. § 1681n(a)(1)(A). Willful violation of the FCRA also triggers
5 liability for “such amount of punitive damages as the court may allow,” and for “reasonable
6 attorney’s fees as determined by the court.” 15 U.S.C. § 1681n(a)(1)(B)-(C). An FCRA violation
7 is willful where it is made either knowingly or with reckless disregard for the requirements
8 imposed under the Act. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56-60 (2007); *see also*
9 *Robins v. Spokeo, Inc.*, 742 F.3d 409, 411 n.1 (9th Cir. 2014) *cert. granted on other grounds*, 135
10 S. Ct. 1892 (2015) (“Willful violations within the meaning of 15 U.S.C. § 1681n include
11 violations in reckless disregard of statutory duty.”) (internal quotation marks and alterations
12 omitted). A defendant acts with “reckless disregard” for the purposes of the FCRA where its
13 actions involve “an unjustifiably high risk of harm that is either known or so obvious that it should
14 be known.” *Safeco*, 551 U.S. at 68 (internal quotation marks omitted).

15 In contrast with willful violations, mere negligent violations do not provide a basis for
16 statutory damages under the FCRA. Recovery for negligent violations is limited to actual
17 damages and attorney’s fees and costs under 15 U.S.C. § 1681o.

18 **B. Analysis**

19 In her SAC, her opposition brief, and the declaration submitted in conjunction with her

1 opposition brief, Banga identifies six instances in which she “elected to exclude her name from all
2 preapproved credit offers mailing lists by credit grantors,” SAC ¶ 36, yet Equifax continued to
3 provide her credit information to third-party credit providers for promotional purposes.

4 The first and second were on April 14, 2003, when Banga alleges that she called 888-567-
5 8688 and “elected to exclude her name permanently,” and on July 10, 2003, when she “signed and
6 returned the Notice of Election to Opt-Out to the address . . . jointly established and maintained by
7 nationwide credit reporting agencies.” SAC ¶ 13.

8 The third was on October 15, 2010, when Banga states that she again called 888-567-8688
9 and again placed a temporary block on her credit file. Banga Decl. ¶ 6. She then requested a copy
10 of her credit report to confirm that the temporary block had been put in place. Banga received a
11 credit report in response to this request, an excerpt of which she attached as an exhibit to her
12 declaration, that includes an “ALERT” stating, “File Blocked for Promotional Purposes.” Banga
13 Decl. Ex. C (Dkt. No. 94). According to Equifax, this “ALERT” was included in Banga’s credit
14 report because in June 2006, Equifax had placed a five-year promotional block on Banga’s credit
15 file which remained in effect in October 2010. *See* Smith Decl. ¶¶ 19-21 (Dkt. No. 86-1).

16 The fourth was on December 11, 2012, when, after checking her Equifax credit report
17 online and seeing that Equifax had provided her credit information to various third-party credit
18 providers in 2011 and 2012, Banga again called Equifax and again requested that Equifax stop
19 distributing her credit information for promotional purposes. Banga Decl. ¶¶ 10-11.

20 The fifth was on January 20, 2013, when Banga sent Equifax a letter memorializing her
21 December 11, 2012 call and instructing Equifax to “stop selling my credit reports for promotional
22 purposes to anyone.” Banga Decl. Ex. G (Dkt. No. 94).

23 The sixth was another letter to Equifax, this one dated February 27, 2013, referencing the
24 January 20, 2013 letter and requesting “an explanation as to why Equifax has continued to sell my
25 credit reports to the creditors for promotional purposes.” Banga Decl. Ex. H (Dkt. No. 94).

26 In a letter dated March 8, 2013, Equifax wrote to Banga stating, “We received your request
27 concerning your Equifax credit file. However, with the information you provided, Equifax was
28 unable to locate a credit file.” Banga Decl. Ex. I (Dkt. No. 94). Equifax asked that Banga

1 resubmit her request with additional identifying information. *Id.* On April 3, 2013, Equifax
2 received a letter from Banga dated March 24, 2013 requesting a permanent promotional block on
3 her credit file. Smith Decl. ¶ 22. Equifax entered the permanent promotional block on April 5,
4 2013. *Id.* ¶ 23. Banga does not contend that there have been any instances of Equifax selling her
5 credit information to third-party credit providers for promotional purposes since then.⁴

6 Equifax contends that none of the six communications alleged by Banga adequately
7 establish that it was required to cease the promotional distribution of her credit information. I
8 agree with Equifax with respect to most of the alleged communications. Banga's alleged call to
9 888-567-8688 on October 15, 2010, however, creates a genuine dispute of material fact that
10 precludes summary judgment on Banga's FCRA cause of action.

11 The alleged April 14, 2003 telephone call fails to support Banga's FCRA claims because a
12 telephone call through the credit reporting agency's reporting system triggers a promotional block
13 for only five years. *See* 15 U.S.C. § 1681b(e)(4)(B)(i). None of the alleged promotional
14 distributions underlying Banga's FCRA claims are within five years of April 14, 2003.

15 The alleged July 10, 2003 "Notice of Election to Opt-Out" fails to support Banga's FCRA
16 claims because, in her opposition brief, Banga explicitly disclaims any reliance on that notice.
17 Opp. at 13 (Dkt. No. 97).

18 The December 11, 2012 telephone call fails because Banga does not allege that the call
19 was to the appropriate telephone number (i.e., 888-567-8688).⁵ Similarly, the January 20, 2013
20 and February 27, 2013 letters are insufficient to withstand summary judgment because it is clear
21 the letters were not the "signed notice of election form issued by the agency." 15 U.S.C. §
22

23 ⁴ Although the SAC identifies one promotional distribution that occurred on "08/17/13," *see* SAC
24 ¶ 15, Banga did not dispute at oral argument that this is a typographical error, and that Equifax has
not sold her credit information for promotional purposes since entering the permanent promotional
block on April 5, 2013.

25 ⁵ At the hearing, in arguing for liability based on the December 11, 2012 telephone call, Banga
26 emphasized that one of the exhibits submitted in conjunction with her opposition brief shows that
27 "Equifax Consumer Services" made an "inquiry" into her credit information on December 11,
2012. *See* Banga Decl. Ex. F (Dkt. No. 94). I agree that this document supports the allegation
(undisputed by Equifax) that Banga contacted Equifax on December 11, 2012. But Banga does
28 not explain how the document shows that she called the appropriate telephone number on
December 11, 2012, and, as stated above, she does not even allege that she did.

1 1681b(e)(2). Banga cites no authority indicating that a written notice other than the “notice of
2 election form issued by the agency” is sufficient to trigger a temporary or permanent promotional
3 block.

4 With respect to Banga’s alleged call to 888-567-8688 on October 15, 2010, Equifax
5 contends that the call fails to support Banga’s claims because, with the exception of Banga’s
6 declaration and deposition testimony, *see Banga Decl. ¶ 6, Ex. B*, there is no evidence that the call
7 in fact occurred. *See Mot.* at 23-24. Pamela Smith, a Legal Support Associate at Equifax, submits
8 a declaration stating that, according to Equifax’s records, a five-year block was placed on Banga’s
9 credit file in June 2006, and that on October 25, 2010, Banga telephoned Equifax to request a
10 credit report, which Equifax provided on that date. Smith Decl. ¶¶ 19-21. The Smith declaration
11 contains no information about the alleged October 15, 2010 call, i.e., it neither asserts nor denies
12 that the call occurred.

13 Equifax is correct that when a party opposing summary judgment “relies only on its own
14 affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by
15 factual data to create an issue of material fact.” *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir.
16 1993); *accord F.T.C. v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) (“A
17 conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is
18 insufficient to create a genuine issue of material fact.”). But Equifax has not shown that this
19 principle entitles it to summary judgment in this case. Banga’s declaration is not a model of
20 precise legal writing. But contrary to Equifax’s characterization, the declaration goes well beyond
21 “conclusory allegations unsupported by factual data.” *Hansen*, 7 F.3d at 128. Banga identifies the
22 specific date on which she called Equifax, the specific number she used to call it, and the specific
23 selection she made during the call to request a temporary promotional block (i.e., “option # 1”).
24 Banga Decl. ¶ 6. She also explains that she chose a temporary promotional block “because in the
25 underlying litigation [– i.e., *Banga II* –] Equifax maintained that it never received [her] written
26 request to block [her] credit file permanently.” *Id.* And she states that “[t]o confirm that [her]
27 credit file had been blocked properly in accordance with [her] request . . . , [she] requested a copy
28 of [her] credit report” on October 25, 2010. *Id.*

1 The only evidence arguably controverting Banga’s narrative of the October 15, 2010 call is
2 the Smith declaration, which is completely silent on whether or not the call occurred. Equifax also
3 contends that, because Banga had requested a temporary promotional block in June 2006 which
4 remained in effect on October 15, 2010, any request for a temporary promotional block by her on
5 October 15, 2010 would be superfluous and would not require any action by Equifax (e.g.,
6 extending the temporary promotional block until October 2015). *See Mot.* at 23-24.⁶ Equifax
7 cites no authority for this interpretation of the FCRA. Its counsel conceded at oral argument that
8 this is a practice of Equifax’s, not a procedure prescribed by law. Indeed, it would be an odd law
9 that would require a consumer to wait until her temporary promotional block had lapsed before
10 she could reinstate it, as Equifax’s practice apparently requires. On this record, there is a genuine
11 factual dispute whether Banga’s alleged telephone call on October 15, 2010 required Equifax to
12 cease promotional distribution of her credit information through October 2015.

13 Equifax also contends that Banga’s FCRA claims fail because she has not produced
14 sufficient evidence of damages. *See Suppl. Br.* at 3-5 (Dkt. No. 93). I disagree. Banga’s
15 emotional distress allegations are sufficient to support her FCRA claims against Equifax’s
16 summary judgment motion. *See Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1332-33
17 (9th Cir. 1995) (holding that the term “actual damages,” as used in the FCRA, “include[s]
18 recovery for emotional distress and humiliation”); *accord Drew v. Equifax Info. Servs. LLC*, 690
19 F.3d 1100, 1109 (9th Cir. 2012) (“The FCRA permits recovery for emotional distress and
20 humiliation.”) (internal quotation marks omitted). Equifax faults Banga for failing to recollect at
21 her deposition when exactly she purchased over-the-counter medications for her claimed mental
22 distress, fatigue, and headaches caused by Equifax’s misconduct, but Equifax cites no authority
23 indicating that such specificity is required. *See Suppl. Br.* at 3-5. Likewise, Equifax fails to cite
24 any authority to support its argument that Banga’s admission to receiving no professional medical
25 treatment as a result of Equifax’s alleged misconduct precludes her as a matter of law from
26 recovering for emotional distress damages. *See id.* at 4-5; *see also Grigoryan v. Experian Info.*

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28

⁶ At oral argument, counsel for Equifax did not dispute Banga’s narrative of the October 15, 2010
was accurate and focused instead on this superfluous request argument.

1 *Sols., Inc.*, 84 F. Supp. 3d 1044, 1086 (C.D. Cal. 2014) (in FCRA case, stating that “district courts
2 in the Ninth Circuit do not require objective evidence of emotional distress, but instead allow a
3 plaintiff’s testimony alone to support an award of emotional distress damages”) (citing cases);
4 *Shuman v. Standard Oil Co. of California*, 453 F. Supp. 1150, 1154 (N.D. Cal. 1978) (in a case
5 involving claims under the Equal Credit Opportunity Act, holding that the plaintiff “raised a
6 genuine issue as to her emotional harm by deposition testimony that she was ‘infuriated,’ ‘angry,’
7 ‘upset’ and ‘felt an injustice had been done’ that needed to be rectified”). On summary judgment,
8 it is not my job to assess the strength of this damages claim. Banga has established a triable issue
9 of fact on damages.

10 At the hearing, Equifax raised a new argument that, even assuming that its failure to extend
11 Banga’s temporary promotional block based on her October 15, 2010 telephone call was a
12 violation of the FCRA, any claims based on that failure would be time-barred under the FCRA’s
13 two-year statute of limitations. The problem with this argument, besides the fact that it was not
14 raised in Equifax’s summary judgment motion, is that the FCRA’s two-year limitations period is
15 triggered by the “discovery by the plaintiff of the violation.” 15 U.S.C. § 1681p; *see also Banga*
16 *v. Equifax Info. Servs., LLC*, 473 F. Appx. 712, 713 (9th Cir. 2012) (in the *Banga Appeal*, stating
17 that “the district court properly granted summary judgment on statute of limitations grounds
18 because Banga failed to file her action within two years of when she knew or should have known
19 that defendant disclosed her credit report to third parties for promotional or other improper
20 purposes”). Nothing in the record indicates that Banga knew or should have known before
21 December 2012 that her temporary promotional block had not been extended. As the Hon. Joseph
22 C. Spero explained in yet another FCRA case filed by Banga in this district, “[t]he ultimate burden
23 is on the defendant to demonstrate that a reasonably diligent plaintiff would have discovered the
24 facts constituting the violation.” *Banga v. Chevron U.S.A. Inc.*, No. 11-cv-01498-JCS, 2013 WL
25 71772, at *12 (N.D. Cal. Jan. 7, 2013) (internal quotation marks and emphasis omitted); *accord*
26 *Drew*, 690 F.3d at 1110. Equifax has not satisfied this burden.

27 While Banga’s cause of action for violation of the FCRA may proceed, I agree with
28 Equifax that Banga has failed to produce sufficient evidence of willfulness. The only theory of

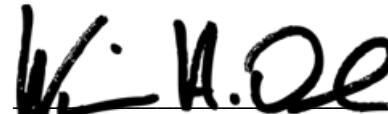
1 liability that survives summary judgment is based on Equifax's alleged failure to extend the
2 temporary promotional block on Banga's credit file in response to her October 15, 2010 telephone
3 call. Her other communications did not satisfy FCRA requirements and, even if they did, do not
4 support a finding of knowing or reckless disregard of Equifax's duties under the FCRA. Nor does
5 the FTC consent order that Banga attached to her declaration and highlighted at oral argument.
6 *See* Banga Decl. Ex. M (Dkt. No. 94). That consent order concerns a course of conduct that has
7 nothing to do with failing to honor opt-out requests, the complained-of conduct here. Banga has
8 not presented evidence from which a juror could reasonably conclude that Equifax's failure to
9 extend her temporary promotional block was willful. Equifax's motion for summary judgment on
10 willfulness is GRANTED.

11 **CONCLUSION**

12 For the foregoing reasons, Equifax's motion for summary judgment is GRANTED IN
13 PART and DENIED IN PART. It is GRANTED with respect to Banga's first, second, fourth, and
14 fifth causes of action. It is also GRANTED with respect to willfulness and all claims for a
15 negligent violation of the FCRA except for one: it is DENIED with respect to the telephone call on
16 October 15, 2010.

17 **IT IS SO ORDERED.**

18 Dated: February 25, 2016

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20 WILLIAM H. ORRICK
21 United States District Judge
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